

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
JJFK ENTERPRISES, LTD.	:	SMALL CLAIMS
AND GEORGE KACHEJIAN	:	DETERMINATION
	:	DTA NOS. 820378
	:	AND 820551
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 2003 through November 30, 2003.	:	

Petitioners, JJFK Enterprises, Ltd., c/o George Kachejian, 41 Powhattan Path, Oakland, New Jersey 07436, and George Kachejian, 41 Powhattan Path, Oakland, New Jersey 07436, each filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2003 through November 30, 2003.

A consolidated small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York on April 19, 2006 at 9:30 A.M. Petitioner George Kachejian appeared *pro se* and also for petitioner JJFK Enterprises, Ltd., as an officer of the corporation. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Peter Ennis and Joseph DeFazio).

Since the parties herein did not reserve time to submit post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

ISSUE

Whether petitioners have established that reasonable cause exists to abate penalty and reduce interest charges from statutory rates to minimum rates.

FINDINGS OF FACT

1. Petitioner JJFK Enterprises, Ltd. (“JJFK”) is an electing S corporation which was incorporated in the State of New Jersey on July 26, 1999. JJFK operated a bar and restaurant in Albany, New York which catered to the college crowd. JJFK purchased the bar and restaurant as a going concern from the previous owner, and it remained in operation until March 2004, when it ceased all operations and liquidated what few remaining assets it had.

2. JJFK timely filed with the Division of Taxation (“Division”) its New York State and Local Sales and Use Tax Return for the quarter ending November 30, 2003, reporting gross and taxable sales of \$72,386.00, which amount generated a sales tax due of \$5,971.85. JJFK did not remit payment to the Division of the sales tax shown as due on its return.

3. On January 20, 2004, the Division issued a Notice and Demand For Payment of Tax Due (“Notice”) to JJFK asserting that \$5,971.85 of tax was due for the quarter ending November 30, 2003. The Notice also asserted that interest of \$71.42 and penalty of \$597.18 were due based on JJFK’s failure to remit payment of the tax due as shown on its return for the period in question.

4. On November 22, 2004, the Division issued a Notice of Determination to petitioner George Kachejian asserting that he was personally liable for the taxes, interest and penalty due from JJFK for the quarter ending November 30, 2003. The Notice of Determination asserted that \$5,971.85 of tax was due, together with interest of \$807.09 and penalty of \$1,238.99. The Notice of Determination gave Mr. Kachejian credit for a \$1,500.00 payment, thus leaving a balance due of \$6,517.93.

5. Petitioner George Kachejian was the president and sole shareholder of JJFK and he performed all of the administrative, clerical and accounting functions for the corporation. In this

proceeding, Mr. Kachejian does not dispute that he is personally liable for payment of any taxes due from JJFK.

6. The tax due for the quarter in question has been paid in full and the only items left unpaid are interest and penalty charges. The following table reflects the payments made to date:

DATE	PAYMENT	PAYMENT MADE BY
11/03/2004	\$1,500.00	George Kachejian
11/30/2004	686.81	Levy on JJFK bank account
12/07/2004	750.00	George Kachejian
01/02/2005	1,000.00	George Kachejian
02/09/2005	1,000.00	George Kachejian
03/09/2005	1,035.24	George Kachejian
Total	\$5,972.05	

7. Petitioner George Kachejian, for the periods both prior and subsequent to the quarter in dispute, was a sole proprietor engaged in business on a full-time basis as a crisis management consultant. Prior to his purchase of the bar and restaurant, Mr. Kachejian had no experience in either owning or operating a bar and restaurant or, for that matter, any other retail business. For the entire time that JJFK was in existence, Mr. Kachejian lived in New Jersey and he performed all of the administrative, clerical and accounting functions for the corporation from this location. Mr. Kachejian's son was present at the bar and restaurant on a daily basis and was the person responsible for its day-to-day operations.

8. Because the bar and restaurant served a college crowd its receipts were cyclical in nature, thus causing cash flow problems on occasion. When the corporation experienced cash flow problems, Mr. Kachejian would, when possible, infuse personal funds.

9. JJFK timely filed its sales and use tax returns, along with its withholding tax returns and corporate franchise tax returns, from the date of its inception until it ceased operations in March 2004. In addition to the one quarter at issue herein, JJFK also failed to pay its reported sales and use tax liability for a prior quarter. On June 26, 2003, JJFK entered into a deferred payment agreement with the Division to pay the tax due for this prior quarter over a 12-month period. JJFK made all 12 payments required under the deferred payment agreement in a timely manner, and thus paid the full tax, penalty and statutory interest as determined due by the Division.

10. Mr. Kachejian has no recollection of ever receiving the Division's Notice issued to JJFK on January 20, 2004. By letter dated August 19, 2004, which was addressed to Mr. Kachejian personally, the Division advised him that the unpaid sales tax due for the quarter at issue was subject to "enforcement action" and that "[u]nless you resolve this matter within ten (10) days a tax warrant will be filed against you. The warrant will serve as a lien against your personal and real property and will allow further enforcement action to continue without further notification."

11. On August 22, 2004, Mr. Kachejian promptly responded to the Division's letter questioning why the letter was addressed to him personally and further stating "since this was a corporate liability I wonder why you haven't attempted to enforce an action against the entity responsible." Notwithstanding that he had not yet been personally assessed for any taxes due from JJFK, Mr. Kachejian, in his letter of August 22, 2004, offered to resolve the matter personally if penalty and interest could be waived.

12. Mr. Kachejian spent the next two months attempting to reach a resolution with the Division concerning his request for waiver of penalty and interest charges. On October 22, 2004, Mr. Kachejian received notice from Fleet Bank that the account which JJFK maintained at the bank had been levied upon by the Division in the amount of \$686.81. By letter dated October 22,

2004, Mr. Kachejian stated that although the Division did not respond to his attempts to settle this matter, he was nonetheless enclosing his personal check in the sum of \$1,500.00 as an initial payment to be applied to the taxes due from JJFK for the quarter ending November 30, 2003. It is noted that Mr. Kachejian made this \$1,500.00 payment prior to the date that he was personally assessed for any taxes due from JJFK.

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(1)(i) and (ii) provides for the imposition of penalty and interest at statutory rates in situations where a vendor/taxpayer fails to file a sales tax return or pay the tax due on or before the date set forth in the statute. The penalty can be waived and statutory interest reduced to minimum rates pursuant to Tax Law § 1145(a)(1)(iii) when it is shown that the failure to timely file the return or timely pay the tax due “was due to reasonable cause and not due to willful neglect. . . .” In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds and also a catchall which provides for a finding of reasonable cause based upon any ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay, demonstrating an absence of willful neglect (20 NYCRR 2392.1[d][5]). The taxpayer bears the burden of establishing that the actions were based upon reasonable cause and not willful neglect (*see, Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993; *Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 193 AD2d 978, 598 NYS2d 360).

B. In establishing reasonable cause for penalty abatement (or interest reduction), the taxpayer faces an onerous task (*Matter of Philip Morris, Inc., supra*). The Tribunal explained that “[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying tax

according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]” (*Matter of MCI Telecommunications Corp., supra*).

C. While it is noted that reasonable cause for failing to timely pay over sales and use taxes does not include financial inability or the need to use the taxes collected for other more pressing obligations (*see, Matter of F & W Oldsmobile v. Tax Commn.*, 106 AD2d 792, 484 NYS2d 188), I nonetheless conclude that, given the particular facts of this case, it is just and equitable (Tax Law § 2012) to cancel the penalty and reduce interest to minimum rates. Mr. Kachejian made reasonable efforts to comply with the Tax Law, and with the exception of two quarters where the sales tax due was not paid on time, JJFK timely filed its returns and timely paid the taxes due. Furthermore, Mr. Kachejian, when financially able to do so, would advance personal funds to keep JJFK’s business operations afloat. Also, and perhaps most compelling, is the fact that Mr. Kachejian voluntarily made the initial \$1,500.00 payment from personal funds one month *before* the Division issued its Notice of Determination holding him personally liable for the taxes due from JJFK, thus establishing that he was acting in good faith and was not willfully neglecting his responsibilities. Finally, JJFK was charged and paid penalty and statutory interest on the prior quarter which was the subject of the deferred payment agreement, thus making this the first time that petitioners have sought to have penalty waived and interest reduced to minimum rates. Careful examination of the record before me establishes that Mr. Kachejian, with respect to JJFK’s tax obligations, acted reasonably and in good faith and that the failure to pay the sales taxes due for the quarter ending November 30, 2003 was not due to willful neglect.

D. The petitions of JJFK Enterprises, Ltd. and George Kachejian are granted to the extent that penalty is waived and interest is reduced to minimum rates; the Notice and Demand For Payment of Tax Due issued to JJFK Enterprises, Ltd. on January 20, 2004 and the Notice of

Determination issued to George Kachejian on November 22, 2004 are to be modified in accordance with this determination; and, except as so granted, the petitions are in all other respects denied.

DATED: Troy, New York
July 13, 2006

/s/ James Hoefer
PRESIDING OFFICER